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Sun Ho Sdn Bhd v Alliance Bank Malaysia Bhd & Anor

B HIGH COURT (KOTA KINABALU) — SUIT NO K1240 OF 1986
DAVID WONG J
25 APRIL 2008

C *Banking — Banker and Customer — Forgery — Drawing of cheques with forged signatures — Whether signatures of authorised signatory on cheques and applications for telegraphic transfers, banker's drafts and cashier's orders were forged — Standard of proof*

D *Evidence — Adverse inference — Failure of defence to call material witness — Whether adverse inference under s 114(g) of the Evidence Act 1950 could be drawn from such omission — Whether there was suppression of evidence*

E *Evidence — Expert evidence — Weight of — Whether expert was suitably qualified to be expert in this case — Whether evidence of handwriting expert in the case of Chinese characters was of questionable value — Whether mistake by expert made his report worthless*

F

According to the plaintiff the first defendant bank had wrongfully debited the sum of RM1,041,459.10 from the plaintiff's account with the first defendant by honouring 55 cheques which did not bear the signature of the plaintiff's authorised signatory. The plaintiff's claim against the second defendant bank
G was also based on the fact that the bank had wrongfully debited the sum of RM195,809.83 from the plaintiff's account with that bank based on 22 cheques and 12 applications for telegraphic transfers, banker's drafts and cashier's orders ('the applications') which did not bear the signature of the plaintiff's authorised signatory. The plaintiff had therefore instituted a claim
H against the two banks for the wrongful debits on the grounds that the signatures appearing on all the said cheques and the applications were forged. The plaintiff's case substantially relied on the written report prepared by the handwriting expert ('the expert's report') and the oral evidence of the expert as well as the evidence of Lee Chong Sang @ Lee Sun Hoo ('Lee') the
I plaintiff's authorised signatory. The undisputed facts of the case were the fact that Lee was detained at Kepayan Prison, Tanjong Aru and Muar detention centre under the Emergency Ordinance during the time when all 77 cheques and the applications were allegedly signed and issued by him; and the fact that the bulk of the money from the cheques and the applications was paid

to Lee's then wife. In the statement of claim Lee pleaded that some unknown person committed the forgeries but in the police report lodged by him he had alleged that his wife had withdrawn the money from the bank by forging his signature. However, an additional problem as to how much weight to place on Lee's evidence arose as a result of Lee's untimely death during cross-examination. The main issue before the court in this case was whether Lee's signature on the 77 cheques and the applications was forged. The expert's finding was that the signatures on the relevant cheques and the applications were not Lee's signature. The defendants from the outset challenged the competency of the expert as an expert witness on the grounds that he had no formal forensic document examination qualification and questioned his ability to identify handwriting in Chinese characters. The defendants therefore contended that the expert's oral evidence and the expert's report were not supported by cogent data and had no probative value but were instead of questionable value.

Held, allowing the plaintiff's claims with costs:

(1) The expert witness was a gazetted document examiner and the expert's report was prepared during his tenure as the head of the documents section of Chemistry Department where he was stationed from 1990 to 1994, and then from 1999 till 2004 as head of that section. In addition the expert witness had also given evidence in court in respect of signatures/handwriting disputes out of which five to six involved Chinese handwritings. The defendants had not seriously challenged these pieces of evidence and therefore it was accepted that the expert witness was an expert in the examination of documents (see para 5).

(2) Although the defendants submitted that the expert's report did not contain any reasons for its conclusion, after the expert had testified as to the format of how an expert's report should be submitted there were no serious challenges mounted by the defendants against the expert's contention. In this instance, serious challenges means the defence commissioning another expert to prepare a report of such nature as the one tendered by the expert in this case during the cross-examination of the expert witness or calling another expert witness who is able to give an opposing opinion on the disputed signatures. In the absence of such a challenge, the expert's report read together with the expert's oral evidence explains the expert's reasons for coming to the conclusion that the signatures that appeared on all the cheques and the applications were forged (see paras 9 & 12).

(3) In the present case there was no direct evidence contradicting the expert's report. Instead the expert's report was corroborated by the undisputed evidence that Lee was in detention during the period when

all the cheques and applications were allegedly signed and issued. Moreover, the sizable number of cheques and applications involved in this dispute made it unlikely that Lee would sign all of them during his incarceration bearing in mind that he was detained under the Emergency Ordinance as opposed to being sentenced to imprisonment for an offence (see paras 12 & 13).

(4) Although the expert had made a mistake in his conclusions as to two signatures, this mistake by the expert did not make the expert's report worthless because the evidence before the court must be considered in its totality. The expert's evidence was corroborated by the undisputed evidence and the expert was a credible witness as was observed from the manner he testified in court. This coupled with the fact that payment for his report was made to the Chemistry Department he headed and not to him personally made the expert a witness without any motive or a disinterested witness whose evidence was safe to rely upon (see para 16).

(5) Although the defendants could have called their bank officers to verify the signatures on the cheques which carried amounts of a sizable nature, there was no evidence tendered to suggest that such verifications were done. In this case, had the bank officers done that they would have discovered that the plaintiff had been detained under the Emergency Ordinance. However, no adverse inference under s 114(g) of the Evidence Act 1950 could be drawn from such an omission on the part of the defendants because such an adverse inference can only be drawn if there is a withholding or suppression of evidence and not on account of a failure to obtain evidence. In this case there was no suppression of evidence but only a judgment call by the defendants that the plaintiff had at the end of its case not proven its case on a balance of probability (see paras 22–23).

(6) As Lee's evidence was incomplete and therefore could not be challenged weight was only placed on Lee's undisputed evidence. In any case the plaintiff had adduced sufficient evidence to support its case without the need to rely on Lee's oral evidence (see para 21).

[Bahasa Malaysia summary

Menurut plaintif, bank defendan pertama telah secara salah mendebitkan jumlah sebanyak RM1,041,459.10 dari akaun plaintif dengan defendan pertama dengan melunaskan 55 keping cek yang tidak mempunyai tandatangan penandatangan plaintif yang sah. Tuntutan plaintif terhadap bank defendan kedua juga adalah berdasarkan fakta bahawa bank tersebut telah secara salah mendebitkan jumlah sebanyak RM195,809.83 dari akaun plaintif dengan bank tersebut berdasarkan kepada 22 keping cek dan 12

permohonan untuk pemindahan telegraf, draf bank dan perintah juruwang ('permohonan-permohonan tersebut') yang tidak mengandungi tandatangan penandatangan plaintif yang sah. Plaintif oleh itu memulakan tuntutan terhadap kedua-dua bank tersebut untuk debit secara salah atas alasan bahawa tandatangan-tandatangan yang terdapat di atas kesemua cek-cek tersebut dan permohonan-permohonan tersebut adalah palsu. Kes plaintif secara substansial bersandarkan atas laporan bertulis yang disediakan oleh pakar tulisan tangan ('laporan pakar') dan keterangan lisan pakar tersebut dan juga keterangan Lee Chong Sang @ Lee Sun Hoo ('Lee'), penandatangan sah plaintif. Fakta kes yang tidak dipertikaikan adalah fakta bahawa Lee telah ditahan di pusat tahanan Penjara Kepayan, Tanjong Aru dan Muar di bawah Ordinan Darurat semasa kesemua 77 keping cek dan permohonan-permohonan tersebut didakwa ditandatangani dan dikeluarkan olehnya; dan fakta bahawa sejumlah besar wang daripada cek-cek dan permohonan-permohonan tersebut telah dibayar kepada isteri Lee pada ketika itu. Di dalam pernyataan tuntutan, Lee memplid bahawa seseorang yang tidak dikenali melakukan pemalsuan tersebut tetapi di dalam laporan polis yang dibuatnya, dia menyatakan bahawa isterinya telah mengeluarkan wang dari bank dengan memalsukan tandatangannya. Walau bagaimanapun, masalah tambahan mengenai berat yang perlu diberikan kepada keterangan Lee timbul daripada kematian Lee yang tidak kena pada waktunya, semasa pemeriksaan balas. Isu utama di hadapan mahkamah di dalam kes ini adalah sama ada tandatangan Lee di atas 77 keping cek tersebut dan permohonan-permohonan tersebut dipalsukan. Penemuan pakar adalah bahawa tandatangan-tandatangan di atas cek-cek yang berkaitan dan permohonan-permohonan tersebut bukan tandatangan Lee. Defendan-defendan sejak dari awal mencabar kecekapan pakar tersebut sebagai saksi pakar atas alasan bahawa beliau tidak mempunyai kelayakan formal pemeriksaan dokumen forensik dan mempersoalkan kebolehannya untuk mengenal pasti tulisan tangan dalam huruf Cina. Defendan-defendan oleh itu menghujah bahawa keterangan lisan pakar dan laporan pakar tidak disokong oleh data yang meyakinkan dan tidak mempunyai nilai probatif tetapi sebaliknya nilai yang boleh dipersoalkan.

Diputuskan, membenarkan tuntutan-tuntutan plaintif dengan kos:

(1) Saksi pakar adalah pemeriksa dokumen-dokumen yang diwartakan dan laporan pakar tersebut disediakan semasa memegang jawatan sebagai ketua bahagian dokumen-dokumen Jabatan Kimia di mana beliau ditugaskan semenjak dari 1990 hingga 1994, dan kemudian dari 1999 hingga 2004 sebagai ketua bahagian tersebut. Tambahan, saksi pakar tersebut juga telah memberikan keterangan di mahkamah berkenaan dengan pertikaian-pertikaian tandatangan-tandatangan/tulisan tangan di mana lima hingga enam daripadanya melibatkan tulisan tangan

Cina. Defendan-defendan tidak secara serius mencabar keterangan-keterangan ini dan oleh yang demikian ia adalah diterima bahawa saksi pakar adalah pakar dalam pemeriksaan dokumen-dokumen (lihat perenggan 5).

(2) Walaupun defendan-defendan menghujah bahawa laporan pakar tidak mengandungi apa-apa alasan bagi keputusannya, selepas pakar tersebut memberi keterangan mengenai format bagaimana laporan pakar harus dikemukakan, tidak ada cabaran yang serius yang diberikan oleh defendan-defendan terhadap hujahan pakar tersebut. Dalam hal ini, cabaran yang serius bermakna pihak pembelaan mengemukakan seorang lagi pakar untuk menyediakan laporan seperti yang dikemukakan oleh pakar dalam kes ini semasa pemeriksaan balas saksi pakar atau memanggil seorang lagi saksi pakar yang boleh memberikan pendapat yang bertentangan mengenai tandatangan-tandatangan yang dipertikaikan tersebut. Tanpa cabaran yang sedemikian, laporan pakar yang dibaca bersama dengan keterangan lisan pakar menjelaskan alasan-alasan pakar untuk membuat keputusan bahawa tandatangan-tandatangan yang terdapat di atas kesemua cek-cek dan permohonan-permohonan tersebut adalah dipalsukan (lihat perenggan 9 & 12).

(3) Di dalam kes ini tidak terdapat keterangan langsung yang menyangkal laporan pakar. Sebaliknya, laporan pakar disokong oleh keterangan yang tidak dipertikaikan bahawa Lee berada dalam tahanan semasa tempoh apabila kesemua cek-cek dan permohonan-permohonan tersebut didakwa ditandatangani dan dikeluarkan. Tambahan, jumlah cek-cek dan permohonan-permohonan yang besar yang terlibat di dalam pertikaian ini tidak memungkinkan bahawa Lee akan menandatangani kesemuanya semasa pemenjaraannya melihatkan bahawa dia ditahan di bawah Ordinan Darurat dan bukan dipenjarakan untuk sesuatu kesalahan (lihat perenggan 12 & 13).

(4) Walaupun pakar tersebut telah melakukan kesilapan di dalam kesimpulannya mengenai dua tandatangan, kesilapan ini oleh pakar tersebut tidak menjadikan laporan pakar tersebut tidak bernilai kerana keterangan di hadapan mahkamah mesti dipertimbangkan secara keseluruhan. Keterangan pakar tersebut disokong oleh keterangan yang tidak dipertikaikan dan pakar tersebut merupakan saksi yang boleh dipercayai seperti yang dilihat dari cara beliau memberi keterangan di mahkamah. Ini bersama dengan fakta bahawa bayaran untuk laporan beliau di buat ke Jabatan Kimia yang diketuainya dan bukan kepada beliau secara peribadi membuatkan pakar tersebut seorang saksi tanpa sebarang motif atau saksi yang tidak berkepentingan yang keterangannya adalah selamat untuk disandarkan (lihat perenggan 16).

(5) Walaupun defendan-defendan boleh memanggil pegawai-pegawai bank mereka untuk mengesahkan tandatangan-tandatangan di atas cek-cek tersebut yang menunjukkan jumlah yang besar, tidak ada keterangan yang dikemukakan untuk menyarankan bahawa pengesahan sedemikian telah pun dilakukan. Dalam hal ini, jika pegawai-pegawai bank telah melakukannya, mereka akan mendapati bahawa plaintif sedang ditahan di bawah Ordinan Darurat. Walau bagaimanapun, tidak ada anggapan bertentangan di bawah s 114(g) Akta Keterangan 1950 yang boleh dibuat daripada ketinggalan yang sedemikian pada pihak defendan-defendan kerana anggapan bertentangan sedemikian hanya boleh dibuat jika terdapat keengganan atau penyekatan keterangan dan bukan atas alasan kegagalan mendapatkan keterangan. Di dalam kes ini tidak terdapat penyekatan keterangan tetapi hanya permohonan untuk penghakiman oleh defendan-defendan bahawa plaintif telah pada akhir kesnya tidak membuktikan kesnya atas imbangan kebarangkalian (lihat perenggan 22–23).

(6) Oleh kerana keterangan Lee tidak lengkap dan oleh itu tidak boleh dicabar, beban hanya diletakkan ke atas keterangan Lee yang tidak dipertikaikan. Walau bagaimanapun plaintif telah mengemukakan keterangan yang mencukupi untuk menyokong kesnya tanpa perlu menyandar atas keterangan lisan Lee (lihat perenggan 21).]

Notes

For cases on expert evidence in general, see 7(2) *Mallal's Digest* (4th Ed, 2006 Reissue) paras 1403–1515.

For cases on failure of defence to call material witness, see 7(2) *Mallal's Digest* (4th Ed, 2006 Reissue) paras 130–132.

For cases on forgery, see 1 *Mallal's Digest* (4th Ed, 2005 Reissue) paras 1847–1852.

Cases referred to

Lee Ing Chin & Ors v Gan Yook Chin & Anor [2003] 2 MLJ 97 (distd)

Syarikat Perkapalan Timor v United Malayan Banking Corp Bhd [1982] 2 MLJ 193 (distd)

Teng Kum Seng v PP [1960] MLJ 225 (refd)

United Asian Bank Bhd v Tai Soon Heng Construction Sdn Bhd [1993] 1 MLJ 182 (refd)

Yong Tim v Hoo Kok Chong & Anor [2005] 3 CLJ 229 (refd)

Legislation referred to

Emergency Ordinance (Public Order & Prevention of Crime) 1969

Evidence Act 1950 s 114(g)

Richard Barnes (Shelley Yap Leong Tseu Chong Chia & Co Advocates) for the plaintiff.

Norbert Yapp Chu Chon (Jayasuriya Kah & Co Advocates) for the first and second defendants.

David Wong J:

INTRODUCTION

[1] The plaintiff claims against the first defendant for the sum of RM1,041,459.10 on the ground that the first defendant had wrongfully debited that amount from the plaintiff's account with the first defendant, based on 55 cheques which did not bear the signature of the plaintiff's authorised signatory. In respect of the second defendant, the plaintiff's claim is for the sum of RM195,809.83 on the ground that they had wrongfully debited that amount from the plaintiff's account with the second defendant, based on 22 cheques and 12 applications for telegraphic transfers, banker's drafts and cashier's orders which did not bear the signature of the plaintiff's authorised signatory.

[2] In both claims the plaintiff's case is that the signatures appearing on the said cheques and applications were forged.

ISSUE

There is only one issue in this case, that is:

> Whether the signatures of Lee Chong Sang @ Lee Sun Hoo in respect of the cheques and the applications for telegraphic transfers, banker's drafts and cashier's orders were forged?

[3] Before I deal with the contention of the counsel, I should state from the outset that the standard of proof required in this case is one of balance of probabilities and not beyond reasonable doubt (see *Yong Tim v Hoo Kok Chong & Anor* [2005] 3 CLJ 229 and *United Asian Bank Bhd v Tai Soon Heng Construction Sdn Bhd* [1993] 2 MLJ 182).

[4] The plaintiff's case substantially relies on the report prepared by PW1 — exh P2 (a-c) (expert's report), his oral evidence and the uncompleted evidence of the Lee Chong Sang @ Lee Sun Hoo (PW2). The expert's finding was that the signatures on the relevant cheques and applications for telegraphic transfers, banker's drafts and cashier's orders were not the signatures of PW2.

IS PW1 A COMPETENT EXPERT WITNESS?

[5] Mr Norbert Yap (Mr Yap), counsel for the defendants, from the outset

challenged the competency of PW1 as an expert witness. His ground was basically that PW1 had no formal forensic document examination qualification and what expertise he had was through an attachment stint with the Los Angeles Police Department which did not cover the identification of handwriting in Chinese Characters. Further PW1 was at various times attached to certain departments which had nothing to do with documents examination. With respect, Mr Yap ignores the fact that PW1 at the relevant time was a gazetted document examiner (P1) and the expert's report was prepared during his tenure as the Head of the Documents Section of Jabatan Kimia (Chemistry Department) where he was stationed from 1990 to 1994, and then from 1999 till 2004 as head of that section. PW1 also had given evidence in court in respect of signatures/handwriting disputes of which five to six times involved Chinese handwritings. He had also testified that there is no difference in principles in examining different scripts. These evidences, in my view, had not been seriously challenged.

[6] Accordingly I have no hesitation in accepting PW1 as an expert in documents examination.

WEIGHT OF THE EXPERT'S REPORT

[7] In dealing with this issue, I take note of what was stated by Annuar J in *United Asian Bank Bhd v Tai Soon Heng Construction Sdn Bhd* [1993] 1 MLJ 182:

> The issue whether a signature on a document has been forged is a question of fact. It is eminently a matter for the trial court to determine after considering the credibility of the witnesses it has seen and heard and taking into account any expert evidence on the point. Of course, a trial judge is not entitled to abdicate his function by allowing the expert to determine the question. In this case, we are satisfied that the learned trial judge has not fallen into an error of this nature. Mr Joginder Singh has attacked Mr Phan's evidence on the ground that he did not give reasons for coming to his conclusion that the signatures on each of the 97 cheques had been forged and in support of his submission relied on a passage in the text book The identification of handwriting and the cross-examination of experts by MK Mehta where the learned author states (at p 23 of the text):
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> > It is common failing in a number of experts that they do not clearly state their reasons on which they base their opinions while submitting the reports to the courts. The result is that the courts as well as the lawyers suffer from a distinct disadvantage. It is extremely difficult for them in such cases to test and verify the correctness of the opinions given. The mere opinion of the expert that a particular writing or signature is written or not written by the writer whose standard admitted writings or signatures were supplied to him for comparison, without any cogent reason, is not enough. The function of the expert is to give his honest opinion and place before the court all the data on which he bases his opinion, because it is the court who has to decide the case and accept or reject

> his opinion. In the absence of a clear and precise statement of his reasons, it is difficult for the court to appreciate the opinion of the expert. It is also not fair to the opposite side who is to cross-examine the expert on the correctness of his opinion. Any opinion given without stating the reasons is valueless and is of no use as evidence.

We entirely agree with the passage cited. In a civil case and more so in a criminal case, the evidence of an expert on handwriting unsupported by cogent data showing the process by which he came to his conclusion is not worth the paper on which it is written and any reliance upon such evidence would, in our judgment, constitute a serious misdirection warranting interference by an appellate tribunal.

[8] Mr Yap's attack on the plaintiff's case can be summarised as these:

Ground 1

[9] It is submitted by Mr Yap that the expert's report was not supported by cogent data and hence unsafe for the court to rely on. He relies on the fact that the expert's report itself did not contain any reasons for the conclusion contained therein. With respect, Mr Yap's contention is misconceived. PW1 had testified that the format of how an expert's report should be prepared is what appears in exh P2 (a-c). No serious challenge had been mounted by Mr Yap on his contention. Serious challenge, in my view, means producing an expert's report of such nature to PW1 during cross-examination to comment or call an expert of documents examination to testify on that contention. In my view the expert's report must be read together with what was stated in PW1-A and his evidence in court. From there one can see that PW1 had set out the reasons why and how he came to his conclusion and some of these reasons are these:

> Q: Can you tell what are those basic principles?
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> A: To differentiate authorship, a combination of a minor differences or a single significant difference in handwriting characteristics must be observed between the questioned handwriting/signatures and the specimen.
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> Another principle is when a person reaches penmanship maturity and he already exhibits certain standard of skill, he cannot forge or copy handwriting of better skill. That means, someone with poorer skill cannot copy another handwriting of better skill, unless he uses tracing, even tracing cannot achieve the line quality.
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> ...
>
> Q: Can you tell the court how having examined the document you arrived at that conclusion?
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> A: I found significant differences in handwriting characteristics between the signatures in Chinese script in the set of documents in items (1) to (12) and the sets of documents in item (13), (14) and (15).

Q: Could you explain what do you mean by significant difference?

A: One significant difference is the skill in penmanship. Something similar to the workmanship of a carpenter. I found the signatures in the set of documents items (1) to (12) to have better penmanship skill than the signatures in the set of documents items (13) to (15).

Another difference that I observed is, in the signatures in the set of documents item (13) to (15), they have a lot of pen lift.

Further, in the signatures in the set of documents items (13) to (15), they do not exhibit connecting strokes as found in the signatures in the set of documents (1) to (12).

Q: Did you detect any other differences?

A: Spacing, proportion of the characters and differences in design …

Q: Could the author of documents (13) to (15) be the same as the author of documents (1) to (12) assuming that the person signing did it on his/her lap, against the wall … etc ie not on a table?

A: No, the authors were different persons …

Q: For Chinese characters, how could you tell whether or not it is handwriting or signature?

A: In Chinese script handwriting, there are certain formation or class characteristics that we can observe in handwriting. We are able to read the characters. We have no difficulties reading the characters. Whereas in signature of Chinese script similar to signatures in Roman script, we may not be able to read the characters because they are symbolic of the design, pattern or representation that are individualised or unique to that person. It is the pattern that is already imprinted in the mind of the person. So when that person is asked to sign subconsciously that pattern of signature will be reproduced. It is imprinted in his mind.

...

Q: You had an opportunity to view that photocopied signature. What gadgets did you use to examine these signatures?

A: A magnifier and table lamp was used.

Ground 2

[10] Mr Yap submits that as the expert's report concerns Chinese characters, it is of very questionable value and relies on what was stated by Gopal Sri Ram JCA in *Lee Ing Chin & Ors v Gan Yook Chin & Anor* [2003] 2 MLJ 97 at p 56:

> We respectfully adopt the views expressed in those cases about the unsatisfactory nature of the opinion evidence of handwriting experts. However, we consider it useful to mention an authority not referred to in the judgment under appeal.

A We do so only because it is a case that is of particular significance to the present case as it also involved the proof of handwriting in Chinese characters. It is *Teng Kum Seng v Public Prosecutor* [1960] MLJ 225 where Thomson CJ when dealing with a complaint that the evidence of a handwriting expert had been given undue weight said:

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> Such evidence is of course always of very questionable value, particularly in the case of Chinese characters.

C **[11]** The just quoted statement must be considered in the context of the case. One of the issues of fact in that case was whether the signature of executor in the challenged will was forged. There were conflicting evidence. On the one hand, there was a report from a hand writing expert which found that the signature was forged. On the other hand, there was the evidence of the lawyer who testified that she had attested the will. The learned judicial D commissioner preferred the evidence of the expert witness to that of the evidence of the attesting witness on the ground that to successfully challenge the expert's evidence there must be another expert witness's opinion. This ground was rejected by the Court of Appeal and this is what they said:

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> The issue is whether the learned judicial commissioner was correct in holding that 'a good way of countering the evidence from these expert witnesses is to bring another expert witness who is able to give an opposing opinion'. In our judgment, the foregoing comment of the learned judicial commissioner when read in the context of the rest of his judgment as a whole leads us to the inescapable conclusion F that the learned judicial commissioner was only prepared to displace in his judicial mind the evidence of one set of experts with another. We are respectfully of the view that the trial court fell into serious error when adopting what we regard as an over-simplistic approach to the evaluation of the totality of the evidence.
>
> We consider it to be a well established general guide to the judicial appreciation of G handwriting evidence that where there is a sharp conflict between the direct testimony of a disinterested witness on the one side and that of a handwriting expert on the other as to the genuineness of the execution of a document, then it is a safe course for a court to prefer the direct evidence. Thus, in *Newton v Ricketts* (1861) 11 ER 731, it was held as follows:

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> Where the genuineness of handwriting to a deed is contested in Chancery, if an affidavit is produced from the sole attesting witness alive that he knew the persons executing the deed, and saw them execute it, and then wrote his own attestation, the fact that persons skilled in handwriting declare their belief, formed on inspection, that the handwriting is not genuine, does not call on that I court to grant an issue to try the disputed fact; but it may determine that fact on the opposing affidavits.

Newton v Ricketts was applied in *Kameswara Rao v Suryaprakasarao* AIR 1962 AP 178, a case concerning the challenge as to the genuineness of a will, where it was held as follows:

> The opinion of a handwriting expert is, no doubt admissible under s 45 [Evidence Act]. What value is to be attached to that opinion in a given case is, however entirely a different matter. An expert's opinion with respect to handwriting must always be received with great caution. There certainly may be, and perhaps are cases where the handwriting expert's opinion may be of assistance to the court in coming to a conclusion as to the genuineness of disputed hand-writing. But the art of forming opinion by comparison of handwriting is essentially empirical in character and error is seldom inseparable from such opinions. Where however, there is direct and trustworthy evidence of persons who had actually seen the signing of the document by the testatrix, it is not necessary to refer to or rely on the expert opinion.
>
> So too here. For the reasons already given, DW2 was clearly a disinterested witness. With great respect to the learned judicial commissioner, his failure to properly appreciate her evidence and to give it the due weight renders his appraisal of this witness to lose its value. So far as DW3 and DW12 are concerned, there was simply no appraisal at all. It follows that the learned judicial commissioner erred in not preferring the evidence of DW2 and DW3 to that of the handwriting experts.

[12] One can see that the facts in that case are different from the present case in that there is no direct evidence contradicting the report of PW1.

[13] Furthermore, the expert's report is corroborated by the following undisputed evidence:

(1) PW2 was detained at Kepayan Prison, Tanjung Aru and Muar detention camp in Johor Baru under the Emergency Ordinance from 9 July 1985 to 17 May 1986.

(2) All 77 cheques and 12 applications for telegraphic transfers, bankers' drafts and cashier's orders were allegedly signed and issued during the period of detention. The sizable number of cheques and applications involved in this dispute makes it unlikely that PW2 would sign all of them during his incarceration bearing in mind he was detained under the Emergency Ordinance as opposed to being sentenced to imprisonment for an offence.

(3) The bulk of the money was paid to PW2's then wife, Liew Kon Mei. In respect of the claim against the first defendant, the sum of RM919,550 out of the claimed amount of RM1,041,459.10 was paid for the benefit Liew Kon Mei. As for the claim against the second defendant, a sum of RM93,042.59 out of the claimed amount of RM195,809.83 was paid for the benefit of Liew Kon Mei.

[14] DW1's evidence does not aid the plaintiff and the defence as most of what he said in court is hearsay. Hence the plaintiff cannot rely on the contents of the newspaper report and similarly the defence cannot rely on

what Liew Kon Mei told him. Neither is the evidence of DW2 helpful to the court. In fact, Mr Yap did not submit on the evidence of DW2.

Ground 3

[15] PW1 had used three specimen signature cards — Sabah Bank and Chartered Bank (items 13, 14 and 16 of exh P2 (a-c)) and 14 specimen signatures (item 15 of exh P2 (a-c)) in preparing his report but when questioned as how old were those 14 specimen signatures, he was not able to answer. Mr Yap in fact put to the witness that those signatures may be given in 1999 which would create a 14 years gap between the making of the specimen and the disputed cheques. And if this was true, Mr Yap submits that those 14 specimen signatures would be useless for comparison. PW1 had, in my view, given a reasonable explanation and this is what he said:

> … The 14 specimen signatures are what we call the requested specimen signatures. For signature verification cases, we request for two types of specimen signatures. They are the contemporaneous specimen signatures and the requested specimen signatures. I have carried out inter comparison of the two types of specimen signatures. And I found them to have similar hand writing characteristics without significant differences between them. In my opinion, they are good specimen signatures for comparison purposes with other disputed signatures or other signatures in question.

Ground 4

[16] In respect of the signatures in two Sabah Bank Bhd cheques book applications (item 12 of P2 (a-c)), PW1 had wrongly concluded that those signatures were forged as PW2 had testified that those signatures were his. Naturally Mr Yap seized on that mistake and submits that the whole report is worthless. I would have no hesitation in accepting that contention if there were no other evidence before this court. But that is not the case here. I must consider the evidence in its totality before me and having done so, I find that this mistake by PW1 does not make the expert's report worthless. As stated earlier in Ground 2, PW1's evidence had been corroborated by undisputed evidence. Not only that, I also find PW1 to be a credible witness after having seen him testify in court. It is not insignificant that PW1, at the time of the preparation of the expert's report, was the Head of the Documents Section of Jabatan Kimia (Chemistry Department). The request for the expert's report was made to Chemistry Department (see exh D2) and the logical inference here is that payment was not paid to PW1 but to the Chemistry Department. In fact no evidence had been led by the defense to the contrary. This factor makes PW1 a witness without any motive or what one calls a disinterested witness which makes his evidence safe to rely on unless shown otherwise.

[17] It is also noteworthy that in the cases of *Syarikat Perkapalan Timor v United Malayan Banking Corp Bhd* [1982] 2 MLJ 193 and *United Asian Bank Bhd*, which also involved forgery of signatures, the expert document examiner called to testify and whose evidence were accepted was from the Chemistry Department. That said I am not saying that the evidence of documents examiners called from that department must be accepted. In the present case, I had set out the reasons on why PW1's evidence should be accepted. Further PW1's resume is not the same as the expert called to testify in *Teng Kum Seng v Public Prosecutor* [1960] MLJ 225 where the expert there, by his own admission, had only studied the subject for a few months and had very little experience in documents examination.

Ground 5

[18] PW2's untimely death during cross-examination raises the issue whether his evidence should be relied on by this court. The law is as stated by Mr Richard Barnes (Mr Barnes), counsel for the plaintiff, at para 40 of his submission which reads as follows:

> The plaintiffs would rely on the Federal Court decision in *Dr Shanmuganathan v Periasamy s/o Sithambaram Pillai* [1997] 3 MLJ 61. The Federal Court there mentioned two factors which ought to be taken into consideration when determining how much weight ought to be placed on the evidence of a witness whose cross-examination was incomplete at p78:
>
> > [Citing *Sarkar on Evidence*] When a witness dies after examination-in-chief and before cross-examination the evidence is admissible, but its probative value may be very small and may even be disregarded. If the examination is substantially complete and the witness is prevented by death, sickness or other causes ... from finishing his testimony, it ought not to be rejected entirely.
>
> In other words, the extent to which the cross-examination has proceeded is one factor. The Federal Court went on to list the second factor:
>
> > Citing [*Mt Horil Kuer & Anor v Rajab Ali & Ors* AIR 1946 Pat 34] ... it was held that the weight to be attached to the evidence depends on the circumstances and the court should look whether there are indications that by a completed cross-examination, the testimony of the witness was likely to be seriously shaken or his good faith to be successfully impeached.
>
> In other words, the circumstances of the case and whether there are indications that by a completed cross-examination, the testimony of the witness was likely to be seriously shaken is another factor.

[19] Mr Yap in his submission places much emphasis on the discrepancy that PW2 in the statement of claim pleaded that the forgeries were committed by some unknown person while in the police report lodged by him on 28 May 1986 (see p 35 of exh A), he alleged that his wife withdrew the money from the bank by forging his signature. Based on that discrepancy, Mr Yap submits that the evidence of PW2 should be rejected completely as a completed cross-examination was likely to seriously shake his testimony.

[20] I don't think one can with any certainty make a conclusion on whether a completed cross-examination would seriously shake PW2's testimony on the evidence before the court; hence I would not attempt to do it. However on the crucial issue of the disputed signatures, the defendants' case would not be prejudiced by PW2's untimely death as they could have challenged PW2's incomplete evidence during the defence case.

[21] This brings me to the submission by Mr Barnes where he contends that the defence is fatally flawed by not producing direct evidence to challenge the expert's report and PW1's evidence.

[22] Before I deal with Mr Barnes's submission let me say that at the end of the plaintiff's case, the plaintiff in my view had adduced sufficient evidence to support its case. That being the case, it is up to the defendants to challenge the evidence of PW1. In their challenge, the defendants relied on the cross-examination of PW1 and the testimony of two witnesses who for reasons as stated earlier do not help the defendants' case. In my view they could have commissioned an expert to prepare a report and have him testify in court on the disputed signatures. They did not do this. They also could have called the officers and the record of the two detention camps to challenge PW2's evidence on the visit of the wife and the condition of the camps. This they did not do. They could have called their bank officers whose task is to verify signatures of cheques to testify. On this I can take judicial notice of the practice of the banking industries of verifying the signatures of drawees of the cheques by telephoning them to confirm the signatures of the cheques or at the very least with their specimen signature cards when the amount are of a sizable nature. In respect of the first defendant, there are eight cheques which contained an amount ranging from RM20,000 to RM250,000. Were these verifications done? If not, why not? In this case had they done this they would have found out that the plaintiff had been detained under the Emergency Ordinance. No explanation was given for these omissions.

[23] And because of these omissions, Mr Barnes had urged the court to invoke s 114(g) of the Evidence Act and make an adverse inference against the defendants for failing to call the officers to testify. With respect, adverse

inference under s 114(g) of the Evidence Act can only be drawn if there is a withholding or suppression of evidence and not merely on account of failure to obtain evidence. In this case, there is no evidence that there was suppression of evidence. What had happened in this case was that the defendants had made a judgment call that the plaintiff at the end of its case had not proved its case on the balance of probability.

[24] Coming back to whether or not I should reject the whole of the PW2's evidence, what I have done is to rely only on the undisputed evidence of PW2 and they are set out in Ground 2.

CONCLUSION

[25] For reasons stated above, I find that the signatures in the 87 cheques and 12 applications for telegraphic transfers, banker's drafts and cashier's orders were not that of PW2 and accordingly I allow the plaintiff's claims as prayed for in its amended statement of claim with costs to be taxed unless agreed.

POST SCRIPT

Shortly after the delivery of my judgment, counsel for the plaintiff wrote to the court to seek clarifications on the award of interest on the judgment sum. Pursuant to that letter I convene a hearing on 28 May 2008 to seek counsels' views on what course of action should be taken by the court. At that hearing Miss Celestina Stuel Galid, counsel for the defendants, confirmed and agreed with Puan Nor Aamirah appearing for the official assignee as liquidator for the plaintiff that the issue of the award of interests on the judgment sum had not been canvassed by the submissions of the counsels and hence had not dealt with by the court. That being the case she requested that counsel should be given a chance to put in their submissions for the court to consider which Puan Nor Aamirah had no objection. Pursuant to that, I ordered that counsels to put in their respective submissions on or before 30 June 2008.

Claims allowed with costs.

Reported by K Nesan